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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Appellant*,

v.

THE UNITED STATES, *Appellee*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS,

AND

BRIEF IN SUPPORT OF SAID PETITION.

MARION DE VRIES,
JESSE P. CRAWFORD,
H. KENNEDY MCCOOK,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. ....

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

To the Honorable, The Chief Justices and Associate Justices of the Supreme Court of the United States:

The petition of the Norwegian Nitrogen Products Company, Inc. respectfully shows:

That the Attorney General of the United States has certified that the case is one to warrant review by the Supreme Court of the United States (U. S. C. Tit. 28, Sec. 308).

That the decision of the United States Court of Customs and Patent Appeals here sought to be reviewed is contrary to and in conflict with the decision of the Court of Appeals of the District of Columbia theretofore rendered in the case of The United States ex rel Norwegian Nitrogen Products

Company, Inc., v. The United States Tariff Commission, et al., 6 Fed. (2d) 491, *both decisions being a construction of the same paragraph of the same statute in cases duly presented and decided between the same parties. The said decision of the Court of Appeals of the District of Columbia on appeal to this Honorable Court was declared a decision "upon the merits" and was not disturbed by this Honorable Court. United States of America ex rel Norwegian Nitrogen Products Company, Inc., Plaintiff in Error, v. United States Tariff Commission, Thomas O. Marvin, et al.*, 274 U. S. 106.

There is, therefore, hereby presented for determination the correctness of conflicting decisions between two courts of equal authority corresponding in jurisdiction to United States Circuit Courts of Appeal, and to both of which courts the same issues will again be presented in cases now pending, and no doubt often hereafter in both said jurisdictions, until final decision of these conflicting decisions by this Court.

QUESTIONS INVOLVED.

The case involves the following fundamental questions arising almost daily in the proceedings before the United States Tariff Commission under the flexible tariff provisions whereat great bodies politic and important commercial interests of the United States are constantly contending that they are by the Commission being denied their statutory rights which afford interested parties the right "to be present, to produce evidence, and to be heard" in the "hearings" of the said Commission of which "reasonable public notice" is required by the statute (42 Stat. 942, U. S. C. Tit. 19, Sec. 156). These questions so arising and hereby presented are as follows:

(a) The construction of and rights afforded interested parties appearing under the flexible tariff provisions, Section 315 (c) of the Tariff Act of 1922 (42 Stat. 942; U. S. C. Tit. 19, Sec. 156), which are essentially the same as the

provisions of the flexible tariff re-enacted as Section 336 of the Tariff Act of 1930 (46 Stat. 701; U. S. C. Tit. 19, Sec. 1336, 1931 Supplement), the former reading:

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and *no proclamation shall be issued* under this section until *such* investigation shall have been made. The commission shall give *reasonable public notice of its hearings* and shall give reasonable opportunity to parties interested *to be present, to produce evidence,* and *to be heard.* The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

(b) The validity of the findings and proclamation thereof by the President made thereunder increasing rates of duty upon merchandise imported by Petitioner, upon the grounds, among others, that Petitioner has been denied its legal rights provided by said Act the granting of which are by the statute made conditions precedent to any such findings and proclamation thereof by the President and of an increased rate of duty;

(c) Whether by protest duly lodged under and by virtue of the provisions of Section 514 of the Tariff Act of 1922, which reads "All decisions of the collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duties chargeable, and as to all exactions of whatever character * * *", a justiciable question was presented to the United States Customs Court or the United States Court of Customs and Patent Appeals, or this Honorable Court, by a case wherein was drawn into question the validity of the findings and proclamation thereof of the President made thereunder, entering into and constituting a factor of a rate of duty laid; for failure of the United States Tariff Commission to pursue the statutory prerequisites to render a valid report thereon to and proclamation by the President;

(d) Whether the record made in the proceedings before the United States Tariff Commission, under and by virtue of the provisions of said flexible tariff, was competent evidence to show that findings and a proclamation of the President thereof, made in pursuance of said proceedings, had not been preceded by a compliance by the Commission with the statutory conditions precedent thereto, regardless of any recitals in such proclamation;

(e) Whether a refusal of the United States Tariff Commission to grant interested parties appearing before it, in pursuance of due notice, in a proceeding under said flexible tariff, *a reasonable opportunity to produce evidence*, contrary to or in violation of the duly established rules of the Commission or the President, is such error as can be reviewed in such a proceeding as this and rendered any presidential proclamation based upon said proceedings void for failure to comply with the prescribed statutory conditions precedent;

(f) Whether, under the provisions of said flexible tariff, plant capacity, capital investment, costs of labor, costs of materials, costs of power, costs of overhead and costs of conversion, were "trade secrets";

(g) Whether the United States Tariff Commission, as a commission proceeding under the provisions of said flexible tariff commanding the memberships and agents thereof not to make public "trade secrets", was thereby or otherwise by law authorized to deny interested parties appearing the right "to be heard" upon any other data than trade secrets upon the particular subject matter before the Commission, and upon which it was proceeding to report to the President;

(h) Whether the United States Tariff Commission by regulation or otherwise could, under promise that cost information collected by it not trade secrets would be kept confidential, deny the right of interested parties duly appearing in the particular proceeding to inspect or be heard thereupon as by the said Act provided;

(i) Whether under the provision of the flexible tariff, Section 315, Tariff Act of 1922 (42 Stat. 941; U. S. C. Tit. 19, Sec. 154), findings and a presidential proclamation made before the United States Tariff Commission had made an investigation and report upon the particular subject matter *in accordance with the law and the rules prescribed by the President*, were for failure to comply with the statutory and regulative conditions precedent, valid findings and proclamation.

While the issues herein presented are with reference to the flexible tariff of 1922, they are by reason of the almost exact similarity of language with successor provisions of the current flexible tariff (1930) equally pertinent thereto, and, as shown by the petitions now before this Court for review of decisions with reference to the flexible tariff of 1930, concern and will affect a highly important part of the final construction of both Acts not in the other said cases here presented.

DECISIONS BELOW.

On February 12, 1932, the United States Court of Customs and Patent Appeals affirmed the judgment of the United States Customs Court overruling the contentions and protest of Petitioner. This opinion has not as yet been reported in the reports of that Court but will be found in Treasury Decisions, Vol. 61, issue of May 26, 1932, No. 21, page 91, T. D. 45674 (R. 200-213).

SUMMARY OF MATTERS INVOLVED.

The flexible tariff originated and was enacted as Sec. 315, Tariff Act of Sept. 21, 1922. (42 Stat. 941-3 U. S. C. 19. Secs. 154-9). Copy hereto annexed in pertinent parts marked Exhibit "A." October 24, 1922, The American Nitrogen Products Company of Seattle, Washington, filed a petition with the United States Tariff Commission to increase the rate of duty upon sodium nitrite

from 3 cents, as provided in said Act, to 4½ cents per pound. (R. 160). July 20, 1923, due notice was published that on the 10th day of September, 1923, at the office of the Commission in Washington, "*a hearing*" in said matter would be held "at which all parties interested will be given an opportunity *to be present, produce evidence and to be heard with regard to the differences in costs of production and all other facts and conditions enumerated in Sec. 315* of the Tariff Act of 1922," (R. 69, 72) affecting sodium nitrite. At said time and place the Norwegian Nitrogen Products Company, of New York, sole American selling agents of the Norsk Hydro-Electric Co., of Norway, importers of sodium nitrite, entered appearance as an interested party in opposition to said petition (R. 72) and demanded a complete copy of the petition filed by the American Nitrogen Products Company upon which the "hearing" had been noticed and was proceeding. This was denied, the Chairman of the Commission stating, "The Commission will protect the confidential nature of *all* information submitted to it (R. 85). Previously a *deleted* copy thereof had been furnished Appellant with all alleged "confidential" matter (costs) stricken (R. 160, 161, 162, 163). At this "hearing" Mr. Graff, President of the petitioner-company, declined to give plant capacity (R. 131) or cost of production (R. 131), stating they were "confidential information" given the Commission. At the continued "hearing" on September 26th, formal demand was made by Appellant as follows (R. 79):

> "* * * I want to make formal requests, as an interested party appearing in this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.
>
> "We want to make the further request that the Commission afford us the same rights to inspect, and to offer evidence in disputation thereof, if we see fit, and

to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

"Third, the same request as to the number of laborers employed, and the wages paid as shown in the American Nitrogen Products testimony submitted before this Commission.

"Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

"Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commission who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we see fit in opposition thereto, and that we have the right and reasonable opportunity to be heard thereupon."

Said summary was mailed appellant September 15, 1923. (R. 163-175.)

October 6, 1923, these requests in so far as they related to inspection of evidence of costs before the Commission and the examination of the agents thereof, were formerly denied by the Commission (R. 146, 147, 148, 149) upon the ground that all such information was "confidential" or "trade secrets." Thereupon, and while the Commission was deliberating upon its report, Appellant obtained from the Supreme Court of the District of Columbia a temporary writ of mandamus, commanding the Commission to comply with Appellant's requests. The Commission answered that all information before it in these investigations as to plant investment, costs of labor, costs of power and costs of material was confidential and "trade secrets" which it was inhibited by law from disclosing. Appellant demurred to this answer. The Supreme Court of the District of Columbia overruled the demurrer. Appellant stood upon the pleadings and duly appealed to the Court of Appeals of the

District of Columbia. The Court of Appeals of the District of Columbia rendered a decision upon the merits *fully sustaining upon the merits every contention of Appellant;* but, taking judicial notice that, pending appeal, the Commission had made its report upon the matter to the President recommending, and he had made and proclaimed his findings and the petitioned increased rate of duty, held the case moot and upon that ground alone rendered judgment against Appellant (6 Fed. Rep. (2d) 491). This Honorable Court on appeal vacated the judgment of the Court of Appeals of the District of Columbia upon the point alone that the case was moot, but expressly declined to pass upon or review the case upon its merits although the Attorney General of the United States joined with counsel for Appellant in urging upon the Court the public importance of an early decision upon the merits of the case—

> *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Culbertson, et al.,* 274 U. S. 106.

Meanwhile, under authority of Sec. 514 of the Tariff Act of 1922 (42 Stats. 969; U. S. C. Tit. 19, Sec. 398), *supra,* Appellant protested the assessment by the Collector of the increased duty upon all its importations of sodium nitrite, setting forth distinctly and specifically the particulars wherein the Commission had denied Appellant its statutory rights, had failed to follow the law, had denied Appellant a fair or legal hearing, wherefore the said proclamation of the President was void and the consequent assessment of the resultant increased rate of duty upon sodium nitrite was illegal. (R. 8, 9, 10, 11, 12.)

On due hearing of said protest before the United States Customs Court the decision of the Collector overruling said protest was affirmed (R. 37) (T. D. 44824). One Judge dissented (R. 52) on the grounds that the flexible tariff act was unconstitutional.

The Court predicated its decision upon the grounds that the courts did not have the power to review such a presidential finding of facts and proclamation thereof upon *any* grounds.

On appeal to the United States Court of Customs and Patent Appeals, the *judgment* of the United States Customs Court was affirmed, but the *decision* reversed. The appellate court held against all contentions of the Government save that the "hearing" contemplated by the statute (Sec. 315) had been given the interested parties appearing *by affording the mere right to introduce testimony* and without the right being afforded to inspect any of the evidence offered by the other side or collected by and before the Commission or to examine any of the Commission's agents (R. 200-213).

To review that judgment and decision this petition is presented.

JURISDICTION.

The statutory provision which sustains the jurisdiction of this Court herein is Section 195 of the Judicial Code (28 U. S. Code Annotated, 308) as amended in 1925 also U. S. C. Tit. 19, 1931 Supplement, 1647.

REASONS RELIED UPON FOR GRANTING OF WRIT.

1. The Attorney General of the United States filed in the United States Court of Customs and Patent Appeals a Certificate to the effect that this case was one warranting review by the Supreme Court of the United States (R. 199-200).

2. There is a conflict of decisions upon the issues of law herein rendered by the Court of Appeals of the District of Columbia and the United States Court of Customs and Patent Appeals, both of which courts as to the particular subject matter are next in authority to this Honorable Court, and in both of which there are pending cases involving the precise legal questions here in issue. This conflict of decisions will continue upon this very important

issue until final decision thereof is rendered by this Honorable Court.

3. The question involved is one of general importance. It is one which arises at almost every session of the United States Tariff Commission proceeding under the flexible tariff provisions of the existing law and in which great bodies politic and extensive importing and domestic interests have been striving for a final and determinative decision to wit, as to the meaning and their rights accorded by scope the words in the flexible tariff, Section 315 (a) of the Tariff Act of 1922 (42 Stats. 941; U. S. Tit. 19, Sec. 154), and Section 336 (a), Tariff Act of 1930 (46 Stats. 701; U. S. C. Tit. 19, Sec. 1336, 1931, Supplement), the language being essentially the same in each Act, as follows: "The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, *and* to be heard."

4. That the decision and judgment of the United States Court of Customs and Patent Appeals herein (R. 200-213) is erroneous in that it overrules the decision of the Court of Appeals of the District of Columbia rendered upon the merits of the case, which was not *obiter dictum*, and which this Honorable Court on appeal refused to disturb declaring it to be "upon the merits" of the case.

5. That the judgment of the United States Court of Customs and Patent Appeals is erroneous and should be reviewed by this Honorable Court because it overruled and did not sustain the protest of Petitioner against the action of the Collector of the Port of New York in assessing merchandise properly dutiable under Paragraph 83 of the Tariff Act of 1922 as originally enacted, at the higher rate imposed by the finding and presidential proclamation herein.

6. That the judgment of the United States Court of Customs and Patent Appeals is erroneous and should be reviewed for holding and deciding that the United States

Tariff Commission had legally pursued the law and the duly promulgated regulations relative to their procedure under the provisions of the said flexible tarff and had therefore made an illegal and invalid report of said matter to the President and the consequent findings and proclamation of the President in pursuance thereof illegal and void.

7. That the United States Court of Customs and Patent Appeals erred in not holding, as so held by the Court of Appeals of the District of Columbia construing the identical provision of the flexible tariff, "that the Appellant was deprived of the right *to be heard* as contemplated by the statute" but on the contrary holding that this Appellant was afforded all the statutory rights provided by the provisions of the said flexible tariff.

8. That the United States Court of Customs and Patent Appeals erred in not holding that the said findings and presidential proclamation thereof were illegal and void because at the time of the making thereof the United States Tariff Commission had not submitted to the President a legal and valid, and in consequence no report, upon the said subject matter ACCORDING TO LAW, as provided by the presidential order submitting such matters to the Tariff Commission, and by law and its own regulations required.

9. That the United States Court of Customs and Patent Appeals erred in not holding, though it referred to the same for the facts upon which it predicated its decision, that in all such cases the record made before the United States Tariff Commission is competent evidence to show whether or not the legal conditions precedent had been properly pursued as legal conditions to any presidential findings and proclamations.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Customs and Patent Appeals, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Court of Customs and Patent Appeals had in the case num-

bered and entitled on its docket, "Customs Appeal No. 3454, Norwegian Nitrogen Products Company, Appellant, v. The United States, Appellee", to the end that this cause may be reviewed and determined by this Court as provided for by statutes of the United States, and that the said judgment of the said United States Court of Customs and Patent Appeals be reversed by this Court and for such other and further relief as to this Honorable Court may seem just and proper.

And the petitioner will ever pray.

MARION DE VRIES,
JESSE P. CRAWFORD,
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Counsel for Petitioner,
Southern Building,
Washington, D. C.

Dated July 25, 1932.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. ———.

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner,*
v.
THE UNITED STATES, *Respondent.*

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW AND THE STATUTES INVOLVED.

For the opinion of the United States Customs Court, dated April 21, 1931, see T. D. 44824 (R. 37-61).

For the opinion of the United States Court of Customs and Patent Appeals, dated May 2, 1932, see T. D. 45674 (R. 200-213).

For section 315 (a) and (c) flexible tariff provision of the Tariff Act of 1922, see Exhibit "A" hereto annexed.

For the proclamation of the President dated May 6, 1924, see (R. 196-198).

For protest of importer overruled by the United States Customs Court and by the United States Court of Customs and Patent Appeals, see (R. 8-12).

II.

PETITIONER'S LEGAL POSITION STATED.

The President was commanded by section 315 (a) of the Tariff Act of 1922 to make certain investigations as to differences in costs of production of certain foreign and domestic articles. Section (c) of the Act in part provided as follows:

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission *and no proclamation shall be issued under this section* until *such investigation* shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence *and* to be heard. The Commission is authorized to adopt such reasonable procedure, rules and regulations as it may deem necessary."

Subdivision (e) provided that "the President is authorized to make all needful rules and regulations for carrying out the provisions of this section." Thereunder the President made the following order or regulation (Record 63-64):

> **"EXECUTIVE ORDER.**
>
> "It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317, of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration *and for such investigation as shall be in accordance with the law* and the public interest, *under rules and regulations to be prescribed by such Commission.*"

The Tariff Commission, duly promulgated its rules wherein, after providing for the taking of testimony and

the acquisition of certain data under oath, and other matters constituting its record, adopted the following as part of its said regulations:

"The Commissioner or Investigator in Charge of Investigations.

"The Commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

"Parties who have entered appearance shall, *prior to the filing of briefs,* have opportunity to examine *the report of the commissioner or investigator* in charge of the investigation *and also the record* except such portions as relate to trade secrets and processes.

Briefs.

"Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to *all parties of record.*

* * * * * * * * *

Final Hearings and Findings.

"Final hearings shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. *The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law."*

It is unnecessary to cite authorities to this Honorable Court that such Rules and Regulations promulgated by both

the President and the Tariff Commission have the full force and effect of law.

Synopsized, the effect thereof when read in connection with the law is that the President was commanded to make certain Findings of Fact and Proclaim them; that his statutory assistant in the performance of that commanded duty was the United States Tariff Commission; that in the particular case as in all cases by general regulation the President directed the Tariff Commission to proceed with the commanded investigation "*in accordance with the law*" * * * and "*under rules and regulations prescribed by the Commission.*" The law provided that in the course of all such investigations the Commission should give reasonable public notice of its *hearings* and reasonable opportunity to interested parties to be present, to produce evidence "*and* to be heard." The Rules and Regulations prescribed by the Commission provided that interested parties appearing should have a right "to examine the Report of the Commissioner or investigator in charge of the investigation *and also the Record* except such portions as relate to trade secrets and processes."

It was further provided by the Commission's Regulations that parties who had previously entered appearances might file briefs and upon permission of the Commission present oral arguments.

It was further likewise provided that the findings of the Commission should be in writing and transmitted "*together with the Record,* certified by the Secretary under the seal of the Commission, to the President for his action under the law."

In this case the Record shows that the Commission did not proceed "in accordance with the law" as directed by the President in that protestant was neither afforded a reasonable opportunity to either "produce evidence" or "be heard." Nor did it, as required by the Rules of the Commission, give interested parties appearing an opportunity to examine either the Report of the Commissioner or inves-

tigator in charge of the investigation, or "the Record." *All evidence as to both domestic and foreign costs of production acted upon by the Commission and the President were withheld from Appellant.*

The Record shows that there was an absolute and complete denial of the interested parties appearing and so requesting at any and all times to examine the Record. There was an absolute and complete denial of the interested parties appearing "to be heard," as that term is defined by the law and decisions of the courts.

The Tariff Commission, therefore, not having proceeded "in accordance with the law," or as required by law, or by its and the regulation of the President, there had been no investigation by the Tariff Commission "in accordance with the law," and therefore no "SUCH investigation" whatever, prior to the President's Proclamation, as by law provided.

Wherefore the statutory command of Congress that no proclamation should be made by the President until "such investigation"—that is to say one in accordance with the law and as commanded by Congress was made, no valid findings or proclamation could be or was made by the President.

Of the several errors assigned by Appellant in the United States Court of Customs and Patent Appeals (R. 1, 2, 3, 4) essentially all thereof, save and except those relating to a denial of the legal rights of Appellant to a "hearing" and "to be present," "to produce evidence," and "to be heard" before the United States Tariff Commission, and that by reason of the very limited time allowed Appellant, September 16 to October 6, to produce evidence in rebuttal of the synopsis of facts submitted by the United States Tariff Commission on the former day which would require the gathering of evidence in different parts of the United States and in Norway, Appellant was denied its statutory right of a "reasonable opportunity to produce evidence," the United States Court of Customs and Patent Appeals disagreed

with the opinion of the lower court and upheld the reasoning and construction contended for by Appellant.

Upon the very important issue as to the legal rights of parties appearing in accordance with a public notice of a "hearing" before the United States Tariff Commission, to wit, the right "to be present, to produce evidence, and to be heard," no better or further argument supporting the contentions of Petitioner herein need be offered than the careful detail resumé of the facts presented by this record and the legal decision thereupon, exceedingly sound rendered by Judge Smith, Judges Robb and Van Orsdel concurring, Court of Appeals of the District of Columbia, in the case of *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, et al.*, 6 Fed. (2d) 491, rendered upon the identical subject matter and statute here before the Court which, in so far as is here pertinent, is as follows:

> SMITH, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia denying relators' petiton praying for a writ of mandamus against the United States Tariff Commission.
>
> Sec. 315 (a) of the tariff act of 1922 empowers the President to ascertain by investigation the differences in cost of production between articles, the growth and product of the United States and like or similar articles, the growth and product of competing foreign countries. If that investigation develops that the duties fixed by the act do not equalize such differences the President is authorized to determine and proclaim the changes in classification or the increases or decreases in the rates of duty provided by the act necessary to equalize foreign and domestic costs of production. Changes in classification and increased or decreased duties so proclaimed by the President take effect under the act within 30 days after the date of their announcement by the President.

Subdivision (c) of section 315 expressly provides that no proclamation shall be issued by the President changing the classification or increasing or decreasing duties until after an investigation of the differences in cost of production has been made by the United States Tariff Commission. That subdivision makes it the duty of the Commission to give public notice of its hearings and to afford to parties interested a *reasonable opportunity* to be present, *to produce evidence and be heard.* The rules, which the Commission is authorized to adopt, prescribe that parties who enter an appearance in the investigations provided for by section 315 shall have the opportunity to examine *the report* of the Commissioner or investigator in charge of the investigation *and* also *the record,* with the exception of such portions of the report or record as relate to trade secrets or processes which section 708 of the act of 1916 forbids the Commission to divulge.

On the 24th of October, 1922, the American Nitrogen Products Company, a Corporation, organized under the laws of the State of Washington, filed with the United States Tariff Commission, a petition and brief praying that the duty of three cents a pound imposed on sodium nitrite by the tariff act of 1922 be increased to 4½ cents per pound. On the 20th of July, 1923, notice was given by the Commission that a public hearing would be held at its office at 10 o'clock a.m., on the 10th of September, 1923, concerning the subject-matter of the petition and that at that time and place the parties interested would be given an opportunity to *be present,* to *produce evidence* and to *be heard* as to differences in cost of production and as to all other facts and conditions pertinent to the matters which were then to be the subject of investigation.

On the 10th of September, 1923, the Norwegian Nitrogen Products Co., appeared before the Commission *and made a formal request that it be given a copy of the petition which initiated the investigation and which was filed by the American Nitrogen Products Company.* To that request the American Nitrogen Products Company objected on the ground that ALL *information* given to the Commission *as to* its *capital assets* and

costs of production was confidential and *was furnished on the promise that it would be so treated by the Commission.* The Chairman announced that "the Commission has considered that when anyone submits information to it which it declared to be *confidential* it shall observe the *confidential relation.*"

On the 11th of September, 1923, the Norwegian Nitrogen Products Company *in writing* formally requested that it be supplied by the Commission with *all facts* submitted to the Commission and also with a *complete* copy of the petition in order that the Company might *be heard* on the matters set forth therein. In the written request was included a brief in which it was stated that the Norwegian Nitrogen Products Company was entirely in the dark as to the real case and actual facts presented to the Commission by the American Nitrogen Products Company and that therefore the opposition to the petition was not in a position to meet the case or the facts so presented. The brief also urged that until the opposition had information as to all matters and every particle of evidence *not trade secrets* submitted to the Commission, no valid finding by the Commission could be had. The Commission ruled that it had obtained its cost data under *pledges of confidence* and that it could not violate those pledges of its own motion. The Commission therefore declined to accede to the request of the opposition.

The Commission furnished to the appellant the application of the American Nitrogen Products Company for an increase of duty, from which application however *was deleted all data* as to *costs of production* AND *all matter deemed to be confidential by the Commission.* Appellant was also favored with a so-called *summary* of information in which it was stated that the domestic price of soda ash, an important material in the manufacture of sodium nitrite, was on September 10, 1925, $1.45 per 100 pounds in bags at makers' works; that the normal consumption of sodium nitrite in the United States was about 6,000,000 pounds per year, and that domestic producers had plant capacities equal to about 87 per cent of that requirement; that from 1¾ to 3½ million pounds of sodium nitrite were

imported annually during the period 1914 to 1921 excepting the year 1920, in which year 11,690,000 pounds came into the country from abroad; that 50 per cent of the demand for sodium nitrite in the United States was supplied by imports; that during the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound; that during the first 6 months of 1923, 3,647,125 pounds of nitrite were imported at an average declared value of 4.4 cents per pound; that the exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,070,000 pounds; that the average invoice value was 4.84 cents per pound c. i. f. New York, from which was deducted packing, inland freight, ocean freight and insurance, leaving an average price at the factory in Norway 4.34 cents per pound. An estimate of the cost of producing sodium nitrite in Norway was also supplied. *With the exception of freight rates on soda ash and the domestic price thereof no information whatever was apparently given to the appellant as to the domestic cost of producing sodium nitrites.* After receiving the summary of information the opposition *again demanded 1st, a reasonable opportunity to inspect and to be heard upon all evidence which had been offered in the case, not deemed by the Commission to be trade secrets, and not, in fact, trade secrets or processes; 2nd, an inspection of all the evidence* in the possession *of the Commission* as to the *cost of power* used in the United States for the production of nitrite; 3rd, information as to the evidence submitted *to the Commission* concerning the *number of laborers employed by the American Nitrogen Products Company and the wages which they received;* 4th, inspection of the evidence submitted *to the Commission* as to the *capital invested* by the American Nitrogen Products Company; 5th, an opportunity to *cross-examine the experts* of the Commission *as to the evidence submitted by them to the Commission.*

The Commission ruled that it would permit the opposition to be heard and to introduce any evidence that it might have, but that it *would not supply any information whatever in addition to* that furnished by its

summary of information. Inspection by the opposition of any original or primary data collected by the Commission and cross-examination of the Commission's investigators as to any of the information secured by them was also refused. *The capital invested by the American Nitrogen Products Company, the value of its plant, the number of laborers employed by the Company, the wages paid and all details as to the cost of production of nitrites was held by the Commission to be confidential information, to which the opposition was not entitled.*

While the investigation of the differences of costs of production of sodium nitrite in the United States and in competing countries *was still pending before the U. S. Tariff Commission* and before its report as to the results of the investigation had been transmitted to the President, the relator on the 12th of September, 1923, filed in the Supreme Court of the District its petition for a writ of mandamus which recited in substance the facts hereinbefore stated and prayed 1st, that a rule or order be granted directing the Tariff Commission and its members to appear and show cause why a writ of mandamus should not issue requiring them to permit the relator to examine the petition of the American Nitrogen Products Company and all data or information or evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Co. whether in the United States or out of it; 2nd, that the Tariff Commission and its members show cause why a public hearing should not be allowed at which the relator and any person or corporation appearing before the Commission, having an interest in the subject-matter, should have the right and opportunity (a) to cross-examine the investigators, experts, agents and witnesses who may have supplied data, information or evidentiary matter to the Commission; (b) to offer evidence in contravention of such data, information and evidentiary matter; (c) to present arguments and representations against said petition and against the probative and legal value of any and all data, information and evidentiary matter on file with the Commission upon which the American Nitrogen Products Company

based its application for an increase of duty on sodium nitrite.

The Supreme Court issued an order to show cause in accordance with the prayer of the petition and in response to the order the Tariff Commission filed its answer in which the demands made by the relator and the rulings thereon as hereinbefore set out were substantially admitted. To the answer a demurrer was filed which was overruled by the court and the relator electing to stand upon its demurrer the court on the 28th of April, 1924, ordered, adjudged and decreed that the prayer of the petition be denied and the petition dismissed. From that judgment this appeal was taken.

After the denial of the petition for mandamus and the dismissal of the petition, the Tariff Commission submitted to the President a report of its investigation of the cost of production of sodium nitrite in the United States and the production, cost thereof in Norway, the principal competing country. Subsequent to that report and on May 6, 1924, the President issued a proclamation in which was recited the investigation made by the Tariff Commission and the President's finding that the costs of production in the United States and Norway, the principal competing country, were not equalized by the duties imposed by Congress on sodium nitrite.

The proclamation also declared that it was necessary to increase the duty on sodium nitrite from three cents to 4½ cents per pound in order to equalize costs of production and accordingly advanced the duty on sodium nitrite from 3 cents to 4½ cents per pounds.

The Tariff Commission contended in the lower court and contends here that Section 315 of the Act of 1922 requiring the Commission to give reasonable public notice of its hearings and a reasonable opportunity to interested parties to be present and produce evidence and to be heard, grants to the interested parties nothing more than the right to present to the Commission such evidence as they may have and to argue their case. We cannot agree with that contention.

Under the act of 1916 the Tariff Commission was a mere investigative body charged with the duty of gathering tariff information and submitting the same

whenever required to the President, the Committee on Ways and Means of the House and the Committee on Finance of the Senate. Unquestionably under that act the Tariff Commission might hear or not hear interested parties and whether it heard or refused to hear them no harm could come to any one inasmuch as no change of duty could be accomplished without the intervention of Congress. Congress was not bound by anything that the Commission might do, say, recommend or find and was entirely free to practice investigations on its own account and to reach a conclusion as to the facts and the inferences to be drawn therefrom utterly at variance with that reported by the Commission.

Section 315 of the Tariff Act of 1922 however sought to make the dutiable list more flexible by giving to the President in certain contingencies and after investigations made by the Tariff Commission the power to change the rates of duty fixed by Congress. Under that Section the rates of duty prescribed by statute may be increased or decreased 50 per cent by the President. That is a very large grant of power if grant it be and for its exercise nothing is required except an investigation and report by the Tariff Commission.

For the correctness of his decision the President must rely on the Commission's fairness, its knowledge of the facts as they are and the verity of its findings and report. For the accuracy of its report and the wisdom of its recommendations, the Commission in its turn depends on ex parte testimony taken by it and on the unverified reports of its investigators in the field after such testimony and reports have been subjected to the test of the *hearing which the statute and the Commission's rules prescribed.*

For the purposes of Section 315 the Commission is no longer left free to hear whom it pleases or what it pleases. It is required by law to give reasonable public notice of the hearing prescribed by the section and to give reasonable opportunity to parties interested to be present, to produce evidence and to be heard. That notice and the right of interested parties to be present, to produce evidence and to be heard, was not

designed as the Commission contends to aid the Commission in getting the economic facts. The Commission needed no such help inasmuch as the act of 1916 as originally passed furnished to that body adequate and effective means to secure all data, evidence, facts information and apparently even trade secrets and processes pertinent to its inquiries. (See Section 706 and 708 of the Act of September 8, 1916 (39 Stat. 797-798.)

The right of interested parties to be present, to produce evidence and to be heard at the hearings contemplated by section 315, *was granted by Congress and not by the Commission. That right was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change in rate, might be discredited, controverted or refuted.*

The Commission in the exercise of the authority conferred upon it by the act of 1916, through its investigators gathered data as to *capital investment, cost of power, wages paid to labor and the cost of production of nitrites in the United States and abroad.* Its refusal to disclose any of that information with the exception of the price of soda ash reduced to little better than an empty form the right of the opposition to be present to produce its evidence *and to be heard.*

Of what value to the opposition was the right to produce evidence if the opposition knew nothing of the data collected by the Commission or of the facts or evidence submitted to the Commission for its consideration in reaching a conclusion as to the cost of production of nitrites? Just how was the opposition to meet the petition of the American Nitrogen Products Company if the former was not permitted to see the petition of the latter and was supplied with nothing better than a deleted copy from which was omitted every material allegation as to the costs of production set out in the petition actually filed with the Commission? Of what use to the opposition was the right to introduce evidence on its part and to argue the case if it had no knowledge of the data gathered by the

Commission or of the information submitted by the American Nitrogen Products Company or of the issue raised by the petition and the evidence.

To hold that the right to be heard means simply the right to produce evidence and to argue the case would leave interested parties at the mercy of those who initiated the proceeding and render useless the safeguard which Congress manifestly interposed to protect importers, merchants, industrials, consumers and even the Commission itself from unreliable data, insufficient evidence and mistaken conclusions of fact.

Barring trade secrets and processes the disclosure of which is expressly forbidden, THE OPPOSITION BY VIRTUE OF ITS STATUTORY RIGHT TO BE HEARD, WAS ENTITLED TO BE INFORMED OF THE FACTS AND EVIDENCE PRIVATELY PRESENTED TO THE COMMISSION for its consideration. St. Louis, Southwestern R. R. Co. v. I. C. C., 264 U. S. 64, 78. Indeed, *under the rules of the Commission* itself, the Norwegian Nitrogen Products Company should have been given an opportunity *to examine the record and the reports* of the Commission or investigator in charge of the investigation.

The term "trade secrets" as ordinarily understood, means an unpatented secret commerciably valuable plan, appliance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. In re Bolster, 59 Wash. 655; National Tube Co. v. Eastern Tube Co., 3 Ohio (C. R.) 459, 462, 464.

There is nothing in the record showing and the appellee does not claim that the making known of any of the costs of production involved the disclosure of any unpatented, secret commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of articles or materials. *For the purposes of this case therefore, the costs of production demanded by the opposition cannot be regarded as trade secrets.*

Costs of production of and by themselves are simply matters of business privacy, the disclosure of which is not forbidden by section 708 of the act of 1916.

Business privacy will be protected, it is true, from more fishing expeditions in search of evidence (Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-306) and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain or malice. The disclosure of matters of business privacy may be compelled however if such matters be material and relevant evidence for the protection of the public or for the determination of the rights of interested parties by a legally constituted tribunal or body authorized to procure and consider such evidence. Bank of Columbus v. Okely, 4 Wheat. 235-244; United States v. Louis. & Nash. R. R., 236 U. S. 318.

As the Commission denied to the appellant access to facts, data, information and reports which it had received for consideration as to the cost of producing nitrites in the United States on the sole ground that such facts, data, information, evidence and reports were confidential and as it does not appear from the record or the finding of the Commission that the examination thereof involved the disclosure of any unpatented, secret, commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of nitrites, *we are of the opinion that the appellant was deprived of the right to be heard as contemplated by the statute.*

Notwithstanding the fact, however, that the appellant was not given the hearing prescribed by section 315, we are convinced that the granting of the writ prayed for would afford to the appellant no substantial relief. The purpose of the investigation made by the Commission in this case was to furnish to the President information which would enable him to determine differences in costs of production, and to fix within the limits prescribed by statute a rate of duty which would equalize such differences. The Commission has made its investigation and reported the results thereof to the President. The President has already acted on that report found the differences in costs of production and made his decision as to the rate of duty which would equalize such differences.

Mandamus to the Commission requiring it to make the disclosure demanded in order that the appellant

might be properly heard, would not in any way modify, affect or violate the rate of duty fixed by the President or compel him to fix a new rate or to restore the rate prescribed by the act of 1922.

* * * * * * * * *

If the Commission had made its report to the President in violation of a valid restraining order or writ of injunction, the appellant would not have been left without a remedy and the court would be diligent in its endeavors to correct as far as the law permitted, the wrong resulting from a contemptuous disregard of its orders. The cases cited by the appellant fully sustain that doctrine, but as no restraining order of any kind was in force at the time the report of the Commission was made to the President, the citations upon which the appellant relies are inapplicable to this case.

The judgment appealed from is affirmed with costs. (Italics ours.)

That said decision was "upon the merits" was declared by this Court. *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff, v. The United States Tariff Commission, et al.*, 274 U. S., 106. Said decision was not *obiter dictum.*

The precise point has been decided by the Supreme Court of the United States repeatedly. It will suffice to quote from *Railroad Companies v. Schutte,* 103 U. S. 118, wherein the identical point was passed upon by that court, stating:

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, *the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that*

> *point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.* Here the precise question was properly presented, fully argued, and elaborately considered in the opinion."

See also *Meyers v. United States,* 272 U. S. 220; *Union Pacific Co. v. Mason City Co.,* 199 U. S. 166; *United States v. Title Insurance Co.,* 265 U. S. 472, 486.

The decision of the United States Court of Customs and Patent Appeals here sought to be reviewed gives to the words "to be present, produce evidence *and* to be heard" the right "to be present" and "to produce evidence" *only,* thereby reading out of the Act any office, force or effect for the words "to be heard". It likewise denies the word "hearing" as used in the Act its well-settled legal scope. That one cannot be "heard" in a case, or that there can be a legal "hearing" upon a subject matter, without examination or knowledge of all the evidence in the record, is so well settled that it seems almost trite of statement or citation. It is uniformly so held. *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U. S., 88-93, and numerous cases cited. *Monroe Gas & Fuel Co. v. Michigan P. U. Co.,* 292 Fed. Rep., 139-148; *St. Louis Railway Co. v. Interstate Commerce Commission,* 264 U. S., 64; *Atchison, Topeka & Santa Fe R. R. Co. v. United States, &c.* (decided January 4, 1932), 284 U. S., 248).

The Supreme Court of the United States in *Interstate Commerce Commission vs. Louisville & Nashville R. Co.,* 227 U. S. 88 at page 93, interpreted the meaning of the word "hearing" as used in such and similar acts, numerous citations therein in support of the text of said decision being cited, stated:

> "The Government further insists that the Commerce Act (38 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the

duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore *its findings must be presumed to have been supported by such information*, even though not formally proved at the hearing. But *such a construction would nullify the right to a hearing*, for manifestly *there is no hearing when the party does not know what evidence is offered or considered* and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of Sec. 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, *but is not available, as such, in cases where the party is entitled to a hearing.* The Commission is an administrative body, and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevails in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners can not act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14."

It will be particularly noted that the Supreme Court in that case at page 91, held, that where a "hearing" is so provided and is not so held as to *all the data* upon which

decision is based *the order of the tribunal made without such hearing is null and void.* The Court then continued:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied; if that granted was inadequate or manifestly unfair;* if the finding was contrary to the 'indisputable character of the evidence.' Tang Tun v. Edsell, 223 U. S. 673, 681; Chin Yoh v. United States, 208 U. S. 8, 13; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite vs. Wolf, 226 U. S. 272; or if the facts found do not, as a matter of law, support the order made; United States v. B. & O. S. W. R. R., 226 U. S. 14; Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301; Oregon Railroad v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central, 215 U. S. 452, 470; Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247." *Mitchell Coal Co. v. Pennsylvania R. R. Co.,* 230 U. S. 282; *Louisville & Nashville R. R. Co. v. Bosworth,* 209 Fed. Rep. 380-445; *Atchison, Topeka & Santa Fe R. R. Co. v. Spiller,* 246 Fed. Rep. 18; *Abilene & S. R. R. Co. et al. v. U. S.,* 288 Fed. Rep. 102-110.

That this Act and the like provisions of the Interstate Commerce Act are comparable for purposes of judicial interpretation is supported by *J. W. Hampton, Jr. & Co. v. The United States,* 276 U. S., 394, wherein this Court sustained the constitutionality of this Act in part citing in support thereof similar delegation of powers in the Interstate Commerce Act and decisions thereupon. Indeed, the decision of the court below is obviously predicated upon an entire misconception of the Congressional and legal theory of the flexible tariff, to wit, in assuming that the Act delegates to the President and the Commission the power *to fix rates of duty;* whereas, as shown by the Act, as pointed out by the Attorney General and by this Honorable Court in the

Hampton case, supra, Congress itself by the Act fixes and lays the rate of duty and delegates only the power to find and translate into figures and proclaim the facts prescribed by Congress thus putting into effect such rates. In the *Hampton case,* upholding the constitutionality of this Act, this Court particularly emphasized this legal effect of the Act and the inclusion therewithin of the right "to be heard," saying (276 U. S., 405):

> "*The Tariff Commission does not itself fix duties,* but before the President reaches a conclusion on the subject of investigation *the Tariff Commission must make an investigation and in so doing must give notice to all parties interested to appear, to produce evidence, and to be heard.*" (Italics ours.)

Wherefore, review by this Honorable Court is respectfully urged that the almost daily denial by the United States Tariff Commission of the claimed rights of numerous trade and labor organizations and great commercial bodies of the United States by reason of conflict of decisions in the two highest courts of present decision with reference thereto be by this Court finally determined.

Very respectfully submitted,

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Dated, July 25, 1932.

EXHIBIT "A."

Section 315 (a) and the here pertinent part of Section 315 (c), Tariff Act of 1922, 42 Stats. 941; U. S. C. Tit. 19, Sec. 154:

"SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided,* That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

* * * * * * * * *

"(c) * * * Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, AND NO PROCLAMATION SHALL BE ISSUED UNDER THIS SECTION UNTIL SUCH INVESTIGATION SHALL HAVE BEEN MADE. The commission shall give *reasonable public notice* of its *hearings* and shall give *reasonable oppor-*

tunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

* * * * * * * * * *"